No. 16378.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURL MELTON HOWZE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Chief Judge Yankwich found appellant guilty on November 12, 1958, after a court trial in the United States District Court for the Southern District of California, Northern Division, of knowlingly failing "to perform a duty required under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he failed and neglected to remain in employment [at the Los Angeles County Department of Charities] for twenty-four (24) consecutive months." [C. Tr. 3-4, 7-8.]* The Court sentenced appellant to the custody of the Attorney General for one (1) year and one (1) day [C. Tr. 7-8]. The District Court had jurisdiction under 18 U. S. C., §3231. Appellant filed notice of appeal on November 19, 1958, within the time prescribed by law [C. Tr. 8-9]. This Court has jurisdiction under 28 U. S. C §1291.

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*C. Tr. refers to the Clerk's Transcript of Record.

Statement of the Case.

August 14, 1953. Appellant registered with Local Board No. 77 in Bakersfield, California [SSF 2].*

October 12, 1953. Appellant filed Classification Questionaire, SSS Form 100, in which he signed Series XIV indicating that he was a conscientious objector [SSF 5-11].

October 26, 1953. Appellant filed Special Form for Conscientious Objector, SSS Form No. 150 [SSF 14-17].

February 16, 1954. Classified I-O, conscientious objector [SSF 3, 12].

May 21, 1957. Ordered to report on June 25, 1957 for Armed Forces physical examination [SSF 24].

June 25, 1957. Found acceptable [SSF 25].

August 19, 1957. Appellant filed Special Report for Class I-O Registrants, SSS Form No. 152, in which he stated he was "conscientiously opposed to any type work under military direction" but "would accept any assignment with [Watchtower Bible and Tract Society]" [SSF 39-42].

September 18, 1957. Appellant asked to indicate his preferences for three types of civilian work contributing to the maintenance of national health, safety or interest [SSF 44].

September 30, 1957. Appellant stated he would not do any of the work offered [SSF 44].

December 3, 1957. Meeting held to find a type of work which appellant would do. He said he would not take any job [SSF 49-52].

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*SSF refers to Appellant's Selective Service File, Government Exhibit 1.

June 6, 1958. Appellant ordered to report to the Local Board on June 17, 1958 for instructions to proceed to a place of civilian employment and further ordered to report for such employment and to remain in such employment for twenty-four (24) consecutive months [SSF 60].

June 17, 1958. Appellant reported to Local Board and was instructed to proceed to the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California on June 18, 1958 [SSF 12, 63].

June 17, 1958. Appellant reported to the Department of Charities but refused all assignments [SSF 12, 60, 66].

I.

The Local Board Did Not Violate Appellant's Right to Have His Claim for an Agricultural Deferment Considered.

50 App. U. S. C. §456(h) provides that:

> "(h) The President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces or from training in the National Security Training Corps of any and all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f) [of this section] under the United States or any State, Territory, or possession, or the District of Columbia, or whose activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors if found to be necesary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any

such category shall be deferred except upon the basis of his individual status: *Provided further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National Security Training Corps under the provisions of section 4(a) of this Act [section 454(a) of this Appendix] until the thirty-fifth anniversary of the date of their birth."

32 C. F. R. §1622.24 provides that:

"(a) In Class II-C shall be placed any registrant who is employed in the production for market of a substantial quantity of those agricultural commodities which are necessary to the maintenance of the national health, safety, or interest, but only when all of the conditions described in §1622.23(a) are found to exist.

"(b) The production for market of a substantial quantity of agricultural commodities should be measured in terms of the average annual production per farm worker which is marketed from a local average farm of the type under consideration. The production of agricultural commodities for consumption by the worker and his family, or traded for subsistence purposes, should not be considered as production for market. Production which is in excess of that required for the subsistence of the farm families on the farm under consideration should be considered as production for market."

32 C. F. R. §1622.23(a) states that:

". . . a registrant's employment in industry or other occupation, service in office, or activity in re-

search, or medical, scientific, or other endeavors, shall be considered to be necessary to the maintenance of the national health, safety, or interest only when all of the following conditions exist:

"(1) The registrant is, or but for a reasonal or temporary interruption would be, engaged in such activity.

"(2) The registrant cannot be replaced because of a shortage of persons with his qualifications or skill in such activity.

"(3) The removal of the registrant would cause a material loss of effectiveness in such activity."

The appellant stated only:

(1) That he was working as a "Farm laborer (Employed under jurisdiction of my Father)";

(2) That he did "various farm work";

(3) That there were "about 3" other year-round workers on the farm;

(4) That the "about 3" other workers and himself raised 28 acres of alfalfa, 77 acres of cotton, 15 cattle, 13 hogs and 4 horses [SSF 5-11].

Appellant had the burden of showing his eligibility for deferment. As this Court said in *Sullivan, Commanding Officer v. Swatzka,* 148 F. 2d 965, 966 (9th Cir. 1945), *cert. den.* 326 U. S. 752 (1945):

"Petitioner's position appears to be that claim for agricultural deferment must be granted unless the local board is presented with evidence contradictory to that offered by the registrant. But the boards have no facilities for assembling evidence. The board

members are non-paid citizens of the community, and one claiming deferment must establish to the satisfaction of his board that he is entitled to it."

See also *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437, 441 (9th Cir. 1946).

Did appellant establish that he was employed in the production for market of "a substantial quantity" of those agricultural commodities which are necessary for the maintenance of the national health, safety or interest?

Did appellant establish that he could not be replaced "because of a shortage of persons with his qualifications or skill?"

Did appellant establish that his removal would cause "a material loss of effectiveness" in agricultural activity?

The Government thinks not.

The appellant only said that he was a farmer. This was not enough.

Imboden v. United States, 194 F. 2d 508, 512 (6th Cir. 1952), *cert. den.* 343 U. S. 957 (1952);

United States ex rel. Lawrence v. Commanding Officer of McCook Army Air Field, 58 Fed. Supp. 933, 943 (D. Nebr. 1945).

In *Dickinson v. United States,* 346 U. S. 389, 395 (1953), the Court held that *Dickinson* "made out a case which meets the statutory criteria [for a minister]." Here, the appellant did not make out a case which met the criteria for agricultural exemption, as previously pointed out. In any event, *Dickinson* is applicable only to claims for ministerial deferment.

Witmer v. United States, 348 U. S. 375, 381-382 (1955).

Significantly, appellant cites no cases extending *Dickinson* to claims for agricultural deferment.

Appellant says: "Worse yet, there is nothing to indicate that his claim [for agricultural deferment] was even considered" (App. Br. p. 5). But 32 C. F. R. §1622.1(c) provides that the local board will receive and consider all information presented to it. And there is a presumption that the board has done its duty. As the Court said in *Sisquoc Ranch Co. v. Roth, supra:*

> "The original classification is not made after a hearing, either upon or without notice, but is fixed primarily from information contained in the registrant's returned questionaire and the relative needs in the various services essential to the war effort. The presumption, of course, is that the board, when it has acted, has done its duty and has correctly fixed the classification. No hearing is provided for except '. . . to hear and determine . . . all questions or claims with respect to inclusion for, or exemption or deferment from, training and service . . .' 50 U. S. C. A. Appendix, §310(a)(2). That is, hearings are held after classification and upon protest or request, as is accurately put in Selective Service Regulations §625.1(a):
>
> "Every registrant, after his classification . . . shall have an opportunity to appear in person before the member or members of the local board . . . if he files a written request therefor within 10 days after . . . Notice of Classification . . . (b) No person other than the registrant may request an opportunity to appear before the local board"* (p. 440).

*Similar provisions are now in 32 C. F. R. §§1623.1(b) and 1624.1.

So the presumption is that the local board considered the information in appellant's classification questionnaire and then classified him I-0 [SSF 3, 5-11]. Appellant asked for no hearing and he took no appeal. He did not exhaust his administrative remedy.

Skinner v. United States, 215 F. 2d 767 (9th Cir. 1954), *cert. den.* 348 U. S. 981 (1955).

II.

There Was Sufficient Evidence to Show That Defendant Was Guilty as Charged in the Indictment.

An indictment charging a violation of the Universal Military Training and Service Act in substantially the language of the statute is sufficient.

Warren v. United States, 177 F. 2d 596, 600 (10th Cir. 1949), *cert. den.* 338 U. S. 947 (1950);

Stassi v. United States, 152 F. 2d 581, 582 (5th Cir. 1946), *cert. den.* 328 U. S. 842 (1946);

Zuziak v. United States, 119 F. 2d 140, 141 (9th Cir. 1941);

United States v. Shibley, 112 Fed. Supp. 734, 745 (S. D. Cal. 1953).

50 App. U. S. C. §462(a) provides that:

"Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . and any person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or

rules, regulations, or directions made pursuant to this title [said sections], . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment."

50 App. U. S. C. §456(j) further provides:

"Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]."

The indictment charged that defendant was ordered by his local board

> "to report on June 17, 1958, to said Local Board . . . to be given instruction to proceed to a place of employment for civilian work contributing to the maintenance of the national health, safety and interest; and defendant was further ordered . . . to report for such employment pursuant to said instructions and to remain in such employment for twenty-four (24) consecutive months . . .; that defendant reported to [the] Local Board . . . on June 17, 1958 and was instructed to proceed and report to the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California, . . . on June 18, 1958 for work as an institutional worker in lieu of induction; that defendant reported to the Los Angeles County Department of Charities, at the time and place so ordered, and at said time and place the defendant knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he failed and neglected to remain in employment for twenty-four (24) consecutive months . . ." [C. Tr. 3-4].

So the indictment was substantially in the words of the statute, although more specific.

The indictment sufficiently apprised the appellant of the offense intended to be charged.

United States v. Sutter, 127 Fed. Supp. 109, 114 (S. D. Cal. 1954).

Appellant submits that "an indictment couched: 'failure to perform a duty required under the act' would be too vague, for the act imposes many dozen duties. This should need no argument" (App. Br. p. 6). But our indictment is not so couched. Our indictment sets forth an order of the local board to report to the Department of Charities in Los Angeles for civilian work on June 18, 1958, and to remain in such employment for 24 months. It charges that on June 18, 1958 and in Los Angeles, California, the defendant failed and neglected to perform a duty required of him under the Universal Military Training and Service Act in that he did not remain in such employment. Thus, our indictment sets out a specific duty and it sets out the specific time and the specific place that appellant failed to perform part of that duty.

The evidence showed that appellant "reported to the Los Angeles County Department of Charities . . . on June 17, 1958, for work under the conscientious objector program," [SSF 66] but "refused all assignments" [SSF 60].

So the defendant did not fail to carry out the first part of his duty: to report for civilian work. He now claims that he did not fail to carry out the second part of his duty: to remain in employment, because, as he says, he "had not started his employment" (App. Br. p. 6). In other words, the appellant claims that by reporting and refusing all assignments he found a niche where he could safely rest without having failed to perform either part of his duty.

The Government's position is simply this: when a registrant reports for employment he begins that employment even though he has not been given an assignment. He begins his employment by being available. And when he refuses his first assignment he has failed to remain in employment.

Defendant is fully protected from the "hazard of a future indictment," because the local board's order [SSF 60] "could only be the basis of one conviction . . . [although] they directed the registrant to perform two duties."

Johnston v. United States, 351 U. S. 215, 222 (1956).

III.

The Universal Military Training and Service Act Does Not Violate the Thirteenth Amendment.

The heading for Part III of Appellant's Brief states that:

> "The Act, As Construed and Applied by the Regulations and the Order to Report for Civilian Work Is in Violation of the Thirteenth Amendment of the United States Constitution Because It Calls for a Private, Non-Federal Labor Draft for the Performance of Services That Are Neither Exceptional nor Related to National Defense in Time of War or During a Declared Emergency."

This statement should be compared with these facts:

May 8, 1945, Germany surrendered. 59 Stat. 1857.

September 2, 1945, Japan surrendered. 59 Stat. 1733.

December 31, 1946. President proclaimed the cessation of hostilities, adding that "a state of war still exists." 61 Stat. 1048.

October 19, 1951. Joint Resolution of Congress and Presidential Proclamation ending the war with Germany. 65 Stat. 451 and 66 Stat. C3.

April 28, 1952. Effective date of the Japanese Peace Treaty. 66 Stat. C31.

December 16, 1950. President issued Proclamation No. 2914 as follows:

> "WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and
>
> "WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world, and
>
> "WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

"WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United State be strengthened as speedily as possible:

"NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.

"I summon all citizens to make a united effort for the security and well-being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.

"I summon our farmers, our workers in industry, and our businessmen to make a mighty production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good.

"I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.

"I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.

"I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.

"I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby 'secure the Blessings of Liberty to ourselves and our Posterity.' "

The Universal Military Training and Service Act, 62 Stat. 604, 50 App. U. S. C. §§451-473, was enacted on June 24, 1948. Therefore the United States has been in a state of war or national emergency at all times since its enactment.

The assumption that there was no emergency when the appellant was ordered to report for civilian work underlies all of Part III of Appellant's Brief. For example, at page 13, he states that "It should be borne in mind that the orders to do civilian work in each of the three cases involved in the Hoepker decision were issued while the Korean emergency was still present: see *Smith, supra,* 409; *Thomas, supra* 413; *Hoepker, supra,* 121." He then goes on: "The question is this momentous: absent national emergency, may Congres draft civilian labor?"

Appellants' error is this: the so-called Korean emergency exists today and has existed continuously since December 16, 1950. I say so-called Korean emergency because the President more aptly described it as an emergency caused by the "increasing menace of the forces of communist aggression," a menace which has grown, not diminished, since the Korean War, and which, ironically, threatens the "blessings of the freedom of worshipping."

The power of Congress to pass selective service laws is based on the war powers in Article 1, §8 of the Constitution which provide that:

> "The Congress shall have Power . . .
>
> * * *
>
> "To declare War, . . .;
> "To raise and support Armies, . . .;
> "To provide and maintain a Navy;
>
> * * *
>
> "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Act of May 18, 1917, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," 40 Stat. 76, was held to be proper exercise of the war powers and not to violate the Thirteenth Amendment.

> *Selective Draft Law Cases,* 245 U. S. 366, 390 (1918).

The Selective Training and Service Act of 1940, 54 Stat. 885, was held to be a proper exercise of the war powers and not to violate the Thirteenth Amendment.

> *Hopper v. United States,* 142 F. 2d 181, 186 (9th Cir. 1944);
>
> *Roodenko v. United States,* 147 F. 2d 752, 754 (10th Cir. 1944), *cert. den.* 324 U. S. 860 (1944).

Also, the Universal Military Training and Service Act of 1948, 62 Stat. 604, was held to be a proper exercise

of the war powers and not to violate the Thirteenth Amendment.

Pomorski v. United States, 222 F. 2d 106, 107 (6th Cir. 1955), *cert. den.* 350 U. S. 841 (1955);

United States v. Wenner, 134 Fed. Supp. 447, 450 (M. D. Pa. 1955), *affm'd.* 234 F. 2d 71 (3d Cir. 1956), *cert. den.* 352 U. S. 908 (1956).

The war powers are not limited to wartime. They include the power to draft men in time of peace.

United States v. Henderson, 180 F. 2d 711, 713 (7th Cir. 1950), *cert. den.* 339 U. S. 963 (1950);

Richter v. United States, 181 F. 2d 591, 592-3 (9th Cir. 1950), *cert. den.* 340 U. S. 892 (1950).

Nor are they limited to periods of declared emergency. This is pointed out by appellant's quotation from the *Richter* case at page 11 of his Brief. Said the Court: "Congress has the power to compel military service of a citizen in peacetime or wartime, *whenever it declares it is necessary* or that an emergency exists requiring the raising of an army." Congress has declared that such service is necessary in Sections 1(b) and (c) of the Universal Military Training and Service Act of 1948, 62 Stat. 604, 50 App. U. S. C. §451(b) and (c), as follows:

"(b) The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.

"(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a sys-

tem of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Since Congress can draft men in peacetime, they can also require that registrants having conscientious objection to war perform civilian work contributing to the national welfare in lieu of induction. Perhaps the best statement of this point is in *Roodenko v. United States,* 147 F. 2d 752, 753-4 (10th Cir. 1944), *cert. den.* 324 U. S. 860 (1944). There, the defendant was called up under the 1940 Act and assigned to civilian work of national importance. He was convicted of refusing to perform that work. Roodenko claimed that Section 5(g) of the Act was invalid because it subjected him to involuntary servitude in violation of the Thirteenth Amendment. The court said:

> "There is no constitutional right of exemption from service in our armed forces on account of religious training or conscientious scruples against participation in war, or for any other reason. This principle is too well settled to need any extended discussion or the citation of a great number of cases. There are none holding to the contrary.
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> * * * * * * * *
>
> "If Congress, as we have held, has the power to compel conscientious objectors to serve in the military forces, they cannot be heard to complain that they are relieved from such service on condition that they nevertheless recognize their obligation of citizenship and respond to call and serve their country in non-military work of national importance, under civilian authority. Congress could have required Roodenko to serve in the armed forces. Having no constitutional right of exemption from such service, he cer-

tainly can have no constitutional grounds to challenge the validity of an Act which gives him a conditional exemption from a service which he could be compelled to perform."

In *United States v. Hoepker,* 223 F. 2d 921, 923 (9th Cir. 1955), *cert. den.* 350 U. S. 841 (1955), the question came up under the 1948 Act. Said the Court:

"The argument based on the Thirteenth Amendment has been disapproved by several courts. United States v. Pomorski, D. C., 125 F. Supp. 68, affirmed 6 Cir., 222 F. 2d 106; United States v. Niles, D. C., 122 F. Supp. 382, affirmed 9 Cir., 220 F. 2d 278; United States v. Sutter, D. C., 127 F. Supp. 109; United States v. Kinney, D. C., 125 F. Supp. 322; United States v. Hoepker, D. C., 126 F. Supp. 118; United States v. Smith, D. C., 124 F. Supp. 406; United States v. Thomas, D. C., 124 F. Supp. 411. We agree with the postulate on which these decisions are based that assignment to a non-federal hospital does not constitute involuntary servitude. In our ardor to preserve individual civil rights pursuant to the mandate of the Constitution, we are prone to lose sight of the duties which every citizen owes his nation and his government under that document. The war power, which is reserved to Congress, encompasses authority to conscript manpower to defend the nation during a national emergency. Selective Draft Law Cases (Arver v. U. S.), 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349. A necessary correlative is the duty of all Americans to serve when called. The strength and vitality of a nation is measured by criteria broader than a numerical count of its men-at-arms. On receipt of the I-0 classification, by grace

UNITED STATES COURT OF APPEALS

IN AND FOR THE NINTH CIRCUIT.

No. 16,378.

BURL MELTON HOUZE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of the judgment entered by the Court on November 19, 1959, affirming the judgment of the Court below.

Appellant reserves his argued position as to each of the points of appeal, but in this Petition addresses himself solely to a feature of the decision wherein he believes the Court may be convinced its result is incorrect.

This Court's opinion decided the agricultural deferment claim, after reciting the pertinent regulations, and the facts, as follows:

> "It is apparent that the facts submitted by the registrant did not make out a prima facie case for a classification of essential farm worker."

Appellant believes the Court did not intend to hold, as it did by implication, that a farm of 77 cotton acres, 22 alfalfa acres, various livestock, and where "the value of the farm products sold the previous year had been $15,000.00" was within the proscription of the opinion-recited regulation, namely, one where the result of the family effort was merely "the production of agricultural commodities for consumption by the worker and his family, or traded for subsistence purposes, and should not be considered as production for market * * *."

True, in the eyes of many, a $15,000.00 family income is not much more than mere subsistence; yet the smaller farm, one of a $15,000.00 cash income, is unquestionably a substantial contributor of agricultural commodities.

The economic contribution of the small farm cannot be ignored; for one thing, as Lincoln said of the common people, there are so many of them. The statistics readily available have not given petitioner a complete picture on relative production. With respect to number, however, we learn from Extension Economist Carpenter, in his November, 1958, extension course pamphlet from Berkeley entitled "Can Farmers be Guaranteed Cost of Production" that in 1955 there were 4,782,416 farms in the United States of which 65% were less than 100 acres in size; 123,074 farms in California, of which 63% were less than 100 acres in size.

With respect to cotton production in California the 1954 federal "Census of Agriculture"[1] states 9,846 farms reported on cotton, representing 874,559 acres.

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1. 1954 Census of Agriculture, U. S. Department of Commerce, Bureau of Census, Washington, 1956, page 41.

A. The number of farms in the above 9,846, *under* 100 acres was 7,900. In the next bracket, farms of 100-199 acres, there were 1,043; thus there were only 903 reporting farms over 199 acres in size, raising cotton in California.

B. The quantity harvested by the above 9,846 farms was 1,456,553 bales. The breakdown, by bales, is, to 499 bales, 9,279 farms; 499-up bales, 903 farms (why this adds up to more farms than the number listed as reporting we do not know). We could not learn the relative values of the cotton produced by the "large" or the "small" farms after extensive reading and conversations in Los Angeles. Letters have been sent to Sacramento and Berkeley people who, it is believed, can give authoritative opinions on the point. Therefore, if this line of argument is impressive to the court (as it is to counsel, who is confident it can be developed as indicated) it is requested that decision on the petition be delayed a week, thus permitting petitioner to submit photocopies of the expected answers.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this Petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. Tietz,
Attorney for Appellant.